Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

Lazy Oil Co.; John B. Andreassi; Thomas A. Miller Oil Company, on behalf of themselves and all others similarly situated; Carl B. Brown, Proprietor; Carl B. Brown Oil; Waco Oil and Gas Company; Gassearch Corporation; Interstate Drilling, Inc.; Alamco, Inc.; R. H. Adkins Companies; and Wynnewood Drilling Associates

v.

Witco Corporation; Quaker State Corporation; Quaker State Oil Refining Corp.; Pennzoil Company; and, Pennzoil Products Company,

Lazy Oil Co., John B. Andreassi; Thomas A. Miller Oil Co., Petitioners

Petition for Writ of Certiorari To the United States Court of Appeals For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTIONS PRESENTED

1. May a class action settlement, the terms of which reveal theretofore unrecognized intra-class antagonisms, be approved under Rule 23(e) without reconsideration of the propriety of class certification under Rule 23(a) and (b)?

2. Does not class counsel who discovers such intra-class antagonism engage in an impermissible conflict of interest in nevertheless pursuing settlement approval over the objection of the representative plaintiffs whose interests are co-extensive with the absentee minority affected thereby?

TABLE OF CONTENTS

Petition For Writ Of Certiorari.....1
Opinions Below.....1
Jurisdiction.....1
Constitutional And Statutory Provisions.....2
Statement Of The Case.....6
Argument.....10
Appendix.....16

TABLE OF AUTHORITIES

Cases

Amchem Products, Inc. vs. Windsor, 521 U.S. 591, 138 L Ed 2d 689, 117 S Ct. 2231 (1997), ...9, 10, 11

Bryan vs. Pittsburgh Plate Glass Co., 494 F 2d 799 (CA3 1974)..... 13

City of Detroit vs. Grinnell Corp., 495 F 2d 448 (2d Cir 1974) 13

Girsh vs. New American Fund, Inc, 521 F 2d 153 (1975). 9,12

Grunin vs. International House of Pancakes, 513 F 2d 114 (CA8 1975), cert denied 423 U.S. 864, 46 L Ed 2d 93, 96 S Ct 124 (1975)..... 13

In Re Corn Derivatives Antitrust Litigation, 748 F2d 157 (CA3 1984).....14

Parker vs. Anderson, 667 F 2d 1204 (CA5 1982) cert denied 459 U.S. 828, 74 L Ed 2d 65, 103 S Ct 63 (1982) 12

Sheffield vs. Itawamba County Board of Supervisors, 439 F 2d 35 (CA5 1971)..... 13

United Founders Life Insurance Co. vs. Consumer National Life Insurance Co., 447 F 2d 647 (CA7 1971) 13

United States vs. Pennzoil Company, 252 F.Supp 962 (WD PA 1965).....6

Other Authorities

Developments-Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1247 , 1447-1457 (1981) 14

Rules

Rule 23 of the Federal Rules of Civil Procedure.....2, 8, 9, 10, 12, 13

Constitutional Provisions

Due Process Clause of the Fifth Amendment to the Constitution of the United States 2, 9, 10, 11, 12, 13

PETITION FOR WRIT OF CERTIORARI

Lazy Oil Co., John B. Andreassi, and Thomas A. Miller Oil Company, on behalf of themselves and all others similarly situated (the "Lazy Oil Objectors"), pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 2, 1999, in order to address an important question of Federal Constitutional law that has not been, but should be, settled by this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reprinted in Appendix A hereto ("App. A") at p. A-1.

JURISDICTION

Petitioner seeks review of the Order of the United States Court of Appeals for the Third Circuit entered in these proceeding on February 2, 1999 (App. A-22), rehearing denied March 10,1999 (App. A-20). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> *No person shall...be deprived of life, liberty, or property, without due process of law...*

Rule 23 of the Federal Rules of Civil Procedure provides as follows:

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members

who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.
(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an

order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

STATEMENT OF THE CASE

This is an anti-trust class action which was initially instituted by the individual Petitioners, Lazy Oil Co., John B. Andreassi and Thomas Miller Oil Company (the "Lazy Oil Objectors") in the spring of 1994 against Witco Corporation, Quaker State Corporation, Quaker State Oil Refining Corporation, Pennzoil Company and Pennzoil Products Company (the "Defendants") and claiming that those Defendants conspired to and did fix and maintain the price of Penn Grade Crude Oil[1] at an artificially low level since 1981.

Each of the Lazy Oil Objectors are field companies, that is, they are actively engaged in the ownership, development and production of oil bearing lands. They are known in the industry as "Independent Producers". There are approximately 1,000 such Independent Producers in the class.

A second and separate class action complaint alleging the identical anti-trust activity against the same Defendants was thereafter filed by Wynnewood Drilling Associates (Wynnewood), on behalf of itself and all others similarly situated. Unlike the Lazy Oil Objectors however, Wynnewood is not an Independent Producer. It is rather an investment partnership formed for the express purpose of retaining the services of an Independent Producer to drill, operate and produce a *circumscribed* number of wells for the partnership's account. These "Investor" wells, so-called in the industry, are typically drilled on a turnkey basis by an Independent Producer on that Independent Producer's own oil bearing lands. The wells are then operated and produced on behalf of the Investors on a contract basis by that Independent Producer.

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[1] See generally *United States vs. Pennzoil Company*, 252 F.Supp 962 (WD PA 1965)

There are approximately 30,000 such individual Investors in the class.

The cases were consolidated and a global class certified under the rubric "Sellers of Pennsylvania Crude Oil". The consolidated case proceeded th.ough a period of extensive discovery and negotiation, which ultimately yielded a proposed global settlement of 14.5 million dollars.

Notwithstanding that the Lazy Oil Objectors constituted three of the four representative plaintiffs (the investment partnership Wynnwood being the fourth), they were neither informed of the progress of, nor participated in any aspect of the settlement negotiations. Its terms remained unknown to them until the eve of class counsel's presentation of the settlement proposal to the District Court for preliminary approval. It then became apparent that the settlement derived from a compromise of what class counsel believed represented the differential between the price actually paid members of the global class for oil produced, and that price which arguably should have been paid but for the anti-trust conduct. So derived, the settlement was proposed to be distributed, net of counsel fees and expenses, to the global class in accordance with each member's proportionate production history. The more oil a particular member produced, the larger his share vis-à-vis other members.

The Lazy Oil Objectors recognized immediately that both the theory of damages used to negotiate the settlement (price differential) and the intended allocation (based on relative production history) represented a fair method of compensating the some 30,000 Investor members of the class since their standing derived from casual investment in a circumscribed number of wells. As Investors, they essentially purchased a cash flow, and compensation for that portion of the cash flow which they lost to the price differential was arguably all that they could claim.

The Independent Producers however were in the business of oil and gas production, each owning variously oil bearing lands and drilling and operating equipment necessary to the development and production of those lands. *Their* injuries cannot be measured, either absolutely or relative to Investors, on the basis of the number of barrels actually produced. The calculus for them rather begins with the barrels they could not produce because of the depressed price of oil and the consequences of that depression upon their individual businesses. That this is clear is illustrated by the fact that under the proposed settlement, the Independent Producers who suffered the greatest injury – complete loss of their business – would ironically stand to receive the smallest allocation of the settlement by reason of the premature cessation of their production.

The Lazy Oil Objectors immediately brought this conundrum to the attention of class counsel, to no avail. Not only did class counsel fail to take steps to protect the adverse interest so uncovered, but he affirmatively opposed any adjustment in either the class or the terms of settlement. He withdrew as counsel for the Petitioners, leaving them and the constituency of absentees they represented without counsel on the eve of the Rule 23(e) hearing.

The Lazy Oil Objectors thereupon retained separate counsel, who, in addition to filing timely objections to the settlement, filed both a motion to establish a subclass of Independent Producers and a motion to remove class counsel by reason of conflict. Some more than 380 additional class members formally joined in these motions of record.

Following evidentiary hearing at which the District Court heard, among others, the undisputed testimony of a once successful Independent Producer to the effect that his business had been destroyed and lost by reason of the depressed price of oil, the Court nevertheless concluded that such damages were

too dependent upon individual factors to justify certifying a separate subclass. (Appendix p. A-24 & 25) The District Court concluded that the settlement was fair and adequate despite its failure to address, either in substance or allocation, the business loss claims of the Independent Producers.

The Lazy Oil Objectors timely appealed, contending not only that the District Court abused its discretion in denying the motion to establish a subclass, but more importantly and irrespective of the propriety of that ruling, that it erred as a matter of law in approving a global settlement in face of what the settlement itself revealed - that there existed a divergence and antagonism of interests sufficient to compel rejection of the settlement on due process grounds. Citing *Amchem Products, Inc. vs. Windsor*, 521 U.S. 591, 138 L Ed 2d 689, 117 S Ct. 2231 (1997), the Lazy Oil Objectors argued unsuccessfully in the Court of Appeals that even if a subclass of Independent Producers could not be properly certified by reason of the necessity of individual proofs of damages, that did not obviate the undisputed existence of the significant intra-class antagonisms pointed up by the settlement itself.

In affirming the District Court, the Court of Appeals eschewed completely any discussion of Rule 23(a) or (b), or the due process protections which they are designed to embody. Finding that the District Court did not abuse its discretion in denying the motion for certification of a subclass, the Court simply affirmed the District Court's approval of settlement based on the nine considerations[2] previously established by that Court for use in Rule 23(e) proceedings in *Girsh vs. New American Fund, Inc.*, 521 F 2d 153 (1975).

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[2] See footnote 3, infra.

ARGUMENT

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The first question presented in this Petition presents the Court with an opportunity to insure that the guiding principles governing the result in *Amchem Products, Inc. vs. Windsor*, 521 U.S. 591, 138 L Ed 2d 689, 117 S Ct. 2231 (1997), are clearly understood to apply in other than "settlement-only" situations. In *Amchem*, this Court granted review to decide the role settlement may play under Rule 23 in determining the propriety of class certification in the relatively unique context of a settlement-only class. In that context courts are simultaneously confronted with an application for class certification and settlement approval with no prospect that the parties intend to litigate and with the transparent purpose of binding absentees to the prearranged settlement. This Court held that in such context not only should the fairness inquiry under Rule 23(e) not be allowed to eclipse the due process safeguards provided by Rule 23(a) and (b), but that the substantive terms of the proffered settlement are important considerations for the latter in that they inform the judgment of the Court with respect to the propriety of the proposed settlement class. By looking to the terms of settlement, the Court was able to ferret out latent intra-class antagonisms which might have otherwise gone unnoticed, and which as it turned out, were fatal to the approval of what otherwise might have been a fair and adequate dollar settlement.

This Petition for Certiorari suggests that there is no reason to restrict the holding in *Amchem* to settlement-only contexts. While as this Court noted, there is ample reason for

heightened due process vigilance in the settlement-only context because the district courts lack in such situations the opportunity which would otherwise obtain during litigation to adjust the class in deference to the emergence of intra-class antagonisms, there is no reason to conclude that this concern does not exist in other than settlement-only contexts.

First, there is no guaranty that negotiations conducted after initial certification and during active litigation will yield a settlement which is any less tainted than the one presented in *Amchem*. Compromise being the soul of negotiation, it is no less likely in the active litigation setting that negotiators on behalf of a global class will unwittingly compromise the claims of certain members of that class out of existence.

The present case is illustrative. Not until the settlement was proposed did it become apparent that the certified class was overbroad and that those with claims beyond the ken of the settlement would nevertheless be bound if it were approved.

Second, and perhaps even more importantly, the opportunity of district courts in a litigation settings to "adjust" the class upon the emergence of intra-class adversity is illusory in a settlement context. The Lazy Oil Objectors *did* apply to the District Court for certification as a subclass. That motion was denied on the grounds that such a subclass would be unmanageable owing to the necessity of individual proofs of loss. But irrespective of the correctness of that ruling, it does not follow that the asserted intra-class antagonism does not exists. What rather follows is only that the claims asserted are not susceptible of class treatment.

The failure of both of the lower Courts to recognize this important distinction is understandable given the state of the law as it has been allowed to evolve in the Circuits unchecked by this Court.

In affirming the District Court's approval of the settlement in this case, the Court of Appeals eschewed completely any discussion of Rule 23(a) or (b), or the due process protections which they are designed to embody. Finding that the District Court did not abuse its discretion in denying the motion for certification of a subclass, the Court simply affirmed the District Court's approval of settlement based on the nine considerations[3] established by that Court in *Girsh vs. New American Fund, Inc.*, 521 F 2d 153 (1975). None of those considerations are however designed to evaluate the impact of settlement on the propriety of certification. In fact, one of the nine – that requiring consideration of the risk of maintaining the class action through the trial – is rather designed to militate in favor of settlement approval where, for example, the defendant threatens to challenge the propriety of continuing the case as a class action.

The Fifth Circuit Court of Appeals has adopted a similar, but only six consideration test for use in Rule 23(e) fairness proceedings. But it too merely focuses upon the dollar adequacy of settlement without regard to its impact on certification. See *Parker vs. Anderson*, 667 F 2d 1204 (CA5 1982) cert denied 459 U.S. 828, 74 L Ed 2d 65, 103 S Ct 63 (1982).

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[3] In *Girsh, supra*, the Third Circuit Court of Appeals adopted the same nine point considerations listed by the Second Circuit in *City of Detroit vs. Grinnell Corp.*, 495 F 2d 448 (2d Cir 1974) as follows: (1) The complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risk of establishing liability; (5) the risk of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all of the attendant risks of litigation.

Other Circuits are less definitive, requiring only that the district courts act as fiduciaries who must serve as guardians of the rights of absent class members in determining whether a proposed settlement is fair, reasonable and adequate. See for example *Grunin vs. International House of Pancakes*, 513 F 2d 114 (CA8 1975), cert denied 423 U.S. 864, 46 L Ed 2d 93, 96 S Ct 124 (1975).

Most tellingly of all however is that all of the Circuits appear to agree that the "clear abuse of discretion" standard is applicable to appellate review of Rule 23(e) decisions, thereby relegating any embedded due process issues arising from the settlement proposal itself subject to a lesser standard than Rule 23(a) and (b) require. See for example *Sheffield vs. Itawamba County Board of Supervisors*, 439 F 2d 35 (CA5 1971); *Bryan vs. Pittsburgh Plate Glass Co.*, 494 F 2d 799 (CA3 1974); *United Founders Life Insurance Co. vs. Consumer National Life Insurance Co.*, 447 F 2d 647 (CA7 1971); *City of Detroit vs. Grinell Corp., supra* (CA2 1974); *Grunin vs. International House of Pancakes, supra* (CA8 1975).

The result is that, except in settlement-only situations where this Court has specifically required consideration of the terms of settlement for both adequacy and propriety of certification, the extant law governing Rule 23(e) proceedings in the Circuits not only improperly focuses the attention of district courts away from any question concerning the propriety of the class *in light of the settlement*, but (in the Third and Second Circuits at least) actually give license to treat any latent intra-class antagonism as a reason to approve, rather than disapprove, the proffered settlement. *Girsh, supra*.

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The second question presented in this Petition raises the issue of class counsel's responsibility in these connections.

The record in this case is clear that the intra-class adversity became obvious to class counsel, if not sooner, at least upon his disclosure of the proposed settlement to the Lazy Oil Objectors. Class counsel's solution to the dilemma posed by the revelation of intra-class antagonism was to withdraw from representation of the Lazy Oil Objectors, and so from representation of the interests of the minority of the class whom they represented. Confident that his court sanctioned withdrawal satisfied his ethical obligations, class counsel proceeded with impunity not only to oppose the objectors' objections to the settlement, but their attempts to establish a subclass as well.

In response, the Lazy Oil Objectors, joined of record by more than 380 class members moved for the removal of class counsel by reason of conflict. The denial of that motion was affirmed on appeal.

There is a dearth of judicial guidance on the subject of the proper application of traditional ethical rules in class action settings. There are clearly situations in which those rules cannot simply be directly applied. They must rather be filtered and transposed to accommodate the complexities and practicalities of class representation. See concurring opinion of Judge Adams, *In Re Corn Derivatives Antitrust Litigation*, 748 F2d 157 (CA3 1984); *Developments-Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1247 , 1447-1457 (1981).

Some situations are self-correcting. Clearly where an intra-class antagonism results in the establishment of a subclass, the ethical issue evaporates in the appointment of separate counsel for that subclass. Where however subclass status is not independently requested or where, as here, a request for subclass status is denied but the genuineness of the intra-class antagonism is undisputed, the dilemma persists.

Should certiorari on this issue be granted, Petitioner will argue that in such situation an ethical duty devolves upon counsel for the class to seek the Court's guidance as to whether

an adjustment to the class will be necessary to relieve him of his conflict and protect the minority interests so effected. Where he cannot in good faith advocate the establishment of a subclass with separate counsel, he should at least request that the Court make an independent inquiry into the genuineness of the class antagonisms alleged before any further advocacy in favor of the proposed settlement. This duty is not without pain. It may be that the adjustment deemed necessary may very well entail the establishment of a subclass or the permitting of renewed opt-out provision for the affected members of the class, either of which might easily scuttle a hard won, and otherwise perhaps even perfectly adequate (in dollars) settlement.

It would be different in this case if class counsel had opposed subclass certification on the grounds that any alleged antagonism of interest was disingenuous and illusory. He did not. His opposition on behalf of the class rather went to the impracticability of subclass treatment of individual business injuries. As it is then, his continued representation of the global class, even through appeal, is a matter of both substantive and ethical concern which has, in the absence of guidance by this Court, escaped appropriate notice.

Respectfully submitted,

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APPENDIX

Opinion of the Third Circuit Court of Appeals A-1

Order Denying Rehearing A-20

Judgment Appealed From A-22

District Court Findings of Fact
& Conclusions of Law (Excerpted) A-24

Filed February 2, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-3067

Lazy Oil Co.; John B. Andreassi; Thomas A. Miller Oil Company, on behalf of themselves and all others similarly situated; Carl B. Brown, Proprietor; Carl B. Brown Oil; Waco Oil and Gas Company; Gassearch Corporation; Interstate Drilling, Inc.; Alamco, Inc.; R. H. Adkins Companies; Wynnewood Drilling Associates

v.

Witco Corporation; Quaker State Corporation; Quaker State Oil Refining Corp.; Pennzoil Company; Pennzoil Products Company,

Lazy Oil Co., John B. Andreassi; Thomas A. Miller Oil Co.,
Appellants

On Appeal From the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No. 94-cv-00110E)
District Judge: Honorable Sean J. McLaughlin

Argued: December 11, 1998
Before: BECKER, *Chief Judge*, STAPLETON, *Circuit Judges* and HARRIS, *District Judge.**

(Filed: February 2, 1999)

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* Honorable Stanley S. Harris, United States District Judge for the District of Columbia, sitting by designation.

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OPINION OF THE COURT

BECKER, *Chief Judge*

This is an appeal from an order of the District Court approving a class action settlement of an antitrust case. Ironically, the lead objector, Lazy Oil Co., is also the lead plaintiff, whose principal, Bennie G. Landers, conceived the suit but later became disaffected with its management and direction and ultimately with its fruits – the settlement. All the objectors are producers of Penn Grade Crude Oil, i.e., crude drawn from the western side of the Appalachian Basin within the states of New York, Pennsylvania, Ohio, and West Virginia.[4] The objectors contend that the settlement is not fair, at least to the producer plaintiffs in contrast to the investor plaintiffs. The objectors distinguish between these two types of class members in making their objections to the settlement, alleging that producer plaintiffs, as full-time oil-producing enterprises, have distinct interests and, particularly, unique losses, as compared to investor plaintiffs, who simply invest funds in oil-producing businesses.

The objectors maintain that producer plaintiffs lost not only revenues from the lower prices paid for their oil (a loss they share with investor plaintiffs), but also suffered the compounded losses from their inability to invest these lost funds in drilling new oil wells or upgrading their existing ones-losses allegedly not applicable to investor plaintiffs. This alleged distinction is also at the heart of the other two issues raised by objectors in this appeal. They contend that the District Court erred in not certifying a subclass of producer

[4] Titusville, Pennsylvania, home of objectors' counsel, is the situs of the Drake Oil Well, the first oil-producing well in the world–drilled in 1859.

plaintiffs to ensure that their unique interests were adequately represented. Finally, they contend that the Class Counsel-originally hired to bring this suit by the lead plaintiffs, who are now objectors-should have been disqualified from representing the remaining class representatives and the entire class once the objectors chose to attack the settlement.

The District Court conducted three days of hearings regarding, *inter alia*, the objectors' claims that the settlement was not fair, that a subclass of producer plaintiffs should be certified, and that Class Counsel should be disqualified from representing the class. On December 31, 1997, the District Court filed an omnibus order overruling objections to the settlement, approving the terms of the settlement, denying objectors' motion to remove or disqualify Class Counsel, denying objectors' motion for certification of a subclass, and denying approval of the plan for allocating the settlement proceeds.

From the objectors' point of view, our opinion should be devoted largely to a merits analysis of their objections to the settlement, measured by the standards outlined in *Girsh vs. Jepson*, 521 F.2d 153 (3d Cir. 1975). However, we dispose of that aspect of the case summarily, concluding that the *Girsh* factors are easily met and that the District Court did not abuse its discretion in approving the settlement. Neither do we have difficulty with the District Court's order refusing to remove or disqualify Class Counsel, which we also affirm. We do, however, expound on this point to clarify the standard for adjudicating such claims in the class action context. More specifically, drawing on the concurring opinion in *In re Corn Derivatives Antritrust Litigation*, 748 F.2d 157, 162 (3d Cir. 1984) (Adams, J., concurring), we adopt a balancing approach to motions to remove or disqualify class counsel on conflict-of interest grounds once former class representatives, i.e., former clients of class counsel, become objectors and therefore adversaries to class counsel's remaining clients.

One other point requires discussion-our appellate jurisdiction. The District Court, in its December 31, 1997, order

from which this appeal was taken, did not dispose of all outstanding issues related to the settlement (i.e., it denied a motion to approve the allocation plan that was part of the settlement). Therefore, we must determine whether the rule of *Cape May Green, Inc. v. Warren*, 698 F.2d 179 (3d Cir. 1983), that in certain circumstances a premature appeal may ripen once collateral issues are disposed of by the district court, confers on us appellate jurisdiction because an allocation plan has since been approved by the District Court. We decide that *Cape May Greene* is both intact and applicable, and that we therefore have jurisdiction to hear this appeal from the order of the District Court, which we, in all respects, affrim.

I. *Background*

The subject of this appeal began as two separate class actions, each brought in the District Court for the Western District of Pennsylvania, by sellers of Penn Grade crude against three purchasers and refiners of this crude, Quaker State, Pennzoil, and Witco. The plaintiffs in both actions alleged that the defendants conspired to depress the price of Penn Grade Crude, in violation of the Sherman Antitrust Act. The cases were consolidated and, in June 1995, the District Court certified the consolidated case as a class action under Rule 23(b)(3), with the class comprising all "direct sellers of Penn Grade Crude" who sold oil to the defendants between January 1, 1981, and June 30, 1995. Shortly thereafter, the plaintiffs settled with Quaker State for $4.4 million. This settlement was approved by the District Court, and no issues relating to it are before us.

In early 1997, after several months of negotiations, plaintiffs reached a settlement with the remaining defendants, under which Pennzoil would pay approximately $9.7 million and Witco would pay approximately $4.8 million, with neither defendant admitting any liability or wrongdoing. Upon presentation of the settlement to the class representatives, two of them, Lazy Oil Co. and Thomas A.

Miller Oil Co., objected to the settlement.[5] At least 384 class members joined Lazy Oil et al. in objecting to the terms of the settlement after receiving notice of its terms.[6] Class Counsel thereafter moved to withdraw from representing the objectors.

In February 1997, the District Court directed that notice of the proposed settlement be sent to all class members and published in local and national newspapers. The objectors filed motions, *inter alia*, requesting that the Court disapprove the settlement, for establishment of a producer subclass, and for disqualification of Class Counsel. As noted above, the District Court conducted three days of evidentiary hearings in April and May 1997. On December 31, 1997, the Court approved the settlement and denied the objectors' motions. With extensive findings of fact, the Court found that plaintiffs faced substantial obstacles to proving that defendants had violated the antitrust laws, as well as serious problems with their theory of damages. The Court also found that the notice to class members had been adequate, and that relatively few class members objected to the settlement. After evaluating these and the other *Girsh* factors, it concluded that the settlement was fair and reasonable, and that the objectors' primary concern, i.e., that producer plaintiffs were not adequately represented or compensated by the settlement, was based on a speculative and unsupported argument (that had been raised very late in the litigation). Therefore, it overruled all of the relevant objections and approved the settlement. This appeal followed.

II. *Appellate Jurisdiction*

As noted above, we must first address the matter of our appellate jurisdiction, which is, of course, limited to those cases for

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[5] A third class representative, John B. Andreassi, later joined Lazy Oil and Thomas A. Miller in objecting to the proposed settlement. Adreassi informed Class Counsel of his objections shortly after the settlement notices had been sent to class members.

[6] Other groups of class members objected as well, but did not appeal from the District Court's orders approving the settlement or the allocation of the proceeds. Therefore, only the objections of the Lazy Oil group are before us, and it is to that group we refer when using the term "objectors."

which Congress has provided. In general, we may only hear appeals from final judgments and from certain prescribed interlocutory orders of the district courts. *See* 28 U.S.C. §§1291-1292; *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) ("The requirement of finality precludes consideration of decisions that are subject to revision, and even of fully consummated decisions that are but steps towards final judgment in which they will merge." (internal quotations and brackets omitted)). In this case, the District Court filed its order approving the settlement and denying the objectors' motions, on December 31, 1997, but in that same order, denied a motion to approve an allocation plan for the settlement proceeds. The objectors filed a notice of appeal within 30 days of this order, on January 29, 1998. *See* Fed. R. App. P. 4(a)(1). Following further negotiations pursuant to an order of the District Court, the parties submitted a revised allocation plan, which was approved on April 13, 1998, more than two months after the notice of appeal had been filed. Final judgment was then entered and the case closed.

While none of the parties (plaintiffs, defendants, or objectors) contests our jurisdiction to hear this appeal, we have an inherent obligation to ensure that we only decide those cases for which there is a proper ground for appellate jurisdiction. *See Collinsgru v. Palmyra Bd. Of Educ.*, 161 F.3d 225, 229 (3d Cir. 1998). The question we have raised *sua sponte* and which we must answer is whether a notice of appeal, filed within 30 days after a district court's order approving a class action settlement but before the court enters a final judgment approving all aspects (including the allocation) of the settlement, ripens upon the district court's entry of final judgment or is premature and void.

Our leading case in this area is *Cape May Greene, Inc. v. Warren*, 698 F.2d 179 (3d Cir. 1983). In *Cape May Greene*, we held that a premature notice of appeal, filed after disposition of some of the claims before a district court, but before entry of final judgment, will ripen upon the court's disposal of the remaining claims. *See id.* at 184-85. In that case, the defendants had filed a cross-claim that was not actually litigated either before or after the entry of the order from which the appeal was taken. When the district court entered an

order dismissing this claim-after the notice of appeal had been filed-we held that appellate jurisdiction existed, as the appellee did not allege any prejudice and "we had [not yet] taken any action on the merits." *Id.* at 184. We believe that exercising jurisdiction in the present case, in which the District Court disposed of the remaining issue and entered a final judgment prior to our consideration of the case, and in which no prejudice is alleged by any party, is consistent with our decision in *Cape May Greene*. *See also Welch v. Cadre Capital*, 923 F.2d 989, 992 (2d Cir.) ("[A] premature notice of appeal from a nonfinal order may ripen into a valid notice of appeal if a final judgment has been entered by the time the appeal is heard and the appellee suffers no prejudice."), *vacated on other grounds sub nom. Northwest Sav. Bank v. Welch*, 501 U.S. 1247 (1991).

Some courts that have followed a rule similar to ours have revisited this doctrine in light of the Supreme Court's 1991 decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991).[7] In *FirsTier*, the Supreme Court stated that Federal Rule of Appellate Procedure 4(a)(2) "permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment *only* when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment." *Id.* at 276 (first emphasis added).[8] Therefore, Rule 4(a)(2) does not support the *Cape May Greene* doctrine when the order from which a notice of appeal is filed is *not* one that would be final if followed

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[7] We also acknowledge that some courts refused, even before *FirsTier*, to adhere to a rule such as ours. *See e.g. United States v. Hansen*, 795 F.2d 35, 37-38 (7th Cir. 1986) (discussing circuit split on the issue, rejecting *Cape May Greene* rule, and noting that the appellants, "anticipating defeat, might as well have filed the notice of appeal simultaneously with the filing of their counterclaims or their answer to the [plaintiff's] complaint"). In such cases, these courts of appeals dismiss the premature appeal, presumably leaving the appellant either without recourse to challenge the actual final order in the case or forced to file its notice of appeal again, if a timely one can still be filed after the appeal is dismissed.

[8] Rule 4(a)(2) provides that "[a] notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry."

immediately by entry of judgment.[9] Relying on this distinction, the Fifth Circuit has recently abrogated its own version of the *Cape May Greene* doctrine. *See United States v. Cooper*, 135 F.3d 960, 963 (5th Cir. 1998) ("*FirsTier* allows premature appeals only where there has been a final decision, rendered without a formal judgment.").[10]

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[9] When asked by us to comment on the jurisdictional issue, the parties argued that the order of December 31, 1997, was a final order from which an appeal could be taken under 28 U.S.C. §1291, because (they argued) the allocation issue was simply a separate, ministerial matter over which the District Court retained jurisdiction after entering a final order approving the settlement. *See Polychrome Int'l Corp. v. Krigger*, 5 F3d 1522, 1544 n.52 (3d Cir. 1993) (holding that jurisdiction exists when an "order sufficiently disposes of the factual and legal issues and ...any unresolved issues are sufficiently "ministerial" that there would be no likelihood of further appeal"). While we need not resolve this issue in light of our invocation of the rule from *Cape May Greene*, we question whether the District Court's order approving the settlement was a "final order." *See In re Chicken Antirust Litig.*, 669 F.2d 228, 235 (5th Cir. Unit B 1982)("As long as a matter such as [allocation of settlement proceeds] remains open, unfinished, or inconclusive, an order will not be considered final regardless of its characterization, and there may be no intrusion by appeal."); *see also Hoots v. Pennsylvania*, 587 F.2d 1340, 1346-48 & n.42 (3d Cir. 1978) (holding that an "order [that] expressly invited any party to submit further plans or proposals and evidence in support thereof" in a desegregation case was considered nonfinal and nonappealable); *Fireman's Fund Ins. Co. v. Joseph J. Biafore, Inc.*, 526 F.2d 170, 173 (3d Cir. 1975) (holding that an order granting plaintiff's motion for summary judgment, with only the computation of interest remaining to be done, was not a final order).

The District Court, in its opinion and order, addressed the merits of the allocation plan and specifically refused to grant a motion to approve this aspect of the settlement. The plan that was eventually approved differed from that included in the settlement approved on December 31. Before this Court, the objectors in their brief specifically refer to (and criticize) "the allocation plan submitted by Class Counsel." Appellants' Br. At 30. Therefore, we question the characterization of this issue as simply "ministerial" and separate from the primary issues of liability and damages. As noted, however, we need not decide this question.

[10] *Cooper* was actually a criminal case, in which Rule 4(b), the counterpart to Rule 4(a)(2), was involved. Yet, the court in *Cooper* noted that the language of the two provisions is "almost identical" and should "be given the same meaning." 135 F.3d at 962. We have likewise read these provisions consistently, and found jurisdiction when a premature notice of appeal is filed in certain criminal cases. *See United States v. Hashagen, 816 F.2d 899, 906 (3d Cir. 1987)(en banc).*

We do not believe that *Cape May Greene* has been overruled by *FirsTier*. *FirsTier* simply limited the reach of Rule 4(a)(2)'s proviso. It did not hold that the Rule 4(a)(2) situation–announcement of a final decision followed by notice of appeal and then entry of the judgment-is the *only* situation in which a premature notice of appeal will ripen at a later date. In fact, Rule 4(a)(4) was amended in 1993 to provide that a premature notice of appeal would later ripen if it was filed after entry of a judgment, but while post-trial motions were pending. Such a premature notice of appeal ripens upon "entry of the order disposing of the last such motion outstanding." Fed. R. App. P. 4(a)(4).[11] Thus, in a number of factual situations, a premature notice of appeal will become effective at a later date.

Finally, Rule 2 of the Federal Rules of Appellate Procedure permits a court of appeals to "suspend the requirements or provisions" of any rule of appellate procedure. *See* Fed. R. App. P. 2. The purpose of the Rule is to ensure that justice is not denied on the basis of a mere technicality. *See id.* advisory committee's note (The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result."). For us to decline jurisdiction in this appeal would elevate a mere technicality above the important substantive issues here involved, as well as the right of the parties in this case to have their dispute resolved on its merits.[12]

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[11] Prior to the amendment, the Rule had provided that "[a] notice of appeal filed before the disposition of any of the [post-trial] motions shall have no effect." Fed. R. App. P. 4(a)(4) (1979). The Supreme Court had interpreted this provision as making such a notice of appeal a "nullity,...as if no notice of appeal were filed at all." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982). No similar provision of Rule 4 currently provides an explicit command that a notice of appeal filed under the circumstances here "shall have no effect." To the contrary, we find that our rule from *Cape May Greene* is fully consistent with the principles embodied in current Rules 4(a)(2) and 4(a)(4), which essentially hold a premature notice of appeal in abeyance until such time as it would be appropriately filed and effective.

[12] We are, of course, mindful of the fact that the authority of Rule 2 cannot be utilized to expand the jurisdiction of the Court. *See, e.g., Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988) (noting that Rule 2 authority does not permit "a court to 'enlarge' the time limits for filing a

In this case, a notice of appeal was filed following final disposition of the key elements of the dispute: liability and the amount of damages. The appellees, both plaintiffs and defendants, were on notice that the objectors would be appealing the approval of the settlement and the denial of their motions by the District Court. No prejudice is claimed or apparent. Long before we considered any aspect of this case, the outstanding issue of allocation was resolved, a final judgment was entered, and the case was closed. *Compare Praxis Properties, Inc. v. Colonial Sav. Bank, S.L.A.*, 947 F.2d 49, 54 n.5 (3d Cir. 1991)("Arguably RTC's appeal, even if it was filed prematurely, ripened once the remaining claims in this case (the impediments to finality) were settled and dismissed." (citing, *inter alia*, *Cape May Greene* and *FirsTier*)), *with United States v. Davis*, 924 F.2d 501 (3d Cir. 1991)(dismissing appeal when notice of appeal was filed prematurely and appellants' allegations of error remained before the district court). Finding our precedent in *Cape May Greene* both intact and applicable to this case, we hold that we have jurisdiction to hear this appeal.

III. *Standard of Review*

Our scope of review of a challenge to the district court approval of a class action settlement is limited. We will reverse a settlement approval only when the district court has committed a "clear abuse of discretion." *In re Prudential Ins. Co. of Am. Sales Practices Litig.* 148 F.3d 283, 299 (3d Cir. 1998) (internal quotations omitted), *cert. denied*, No. 98-819, 1999 WL 16241 (U.S. Jan. 19, 1999) *and cert. denied*, No. 98-888, 1999 WL 16242 (U.S. Jan. 19, 1999). We review a district court's decision not to certify a subclass for abuse of discretion. *See Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 255 (3d Cir. 1984). A district court's denial of a motion to disqualify counsel is also reviewed for abuse of discretion. *See Kroungold v. Triester*, 521 F.2d 763, 765 & n.2 (3d

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notice of appeal"). Giving effect to a previously filed notice of appeal upon the district court's disposition of outstanding claims does not extend the time limits imposed on our jurisdiction.

Cir. 1975). However, to the extent that the questions underlying the disqualification motion are purely legal (e.g., whether class counsel who represented objectors when the latter were class representatives can continue to represent the class), our review is plenary. *See Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1088 (3d Cir. 1976).

IV. *Settlement of the Class Action*

The leading case establishing the requirements for evaluating a class action settlement is *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975). Here, the District court appropriately analyzed the settlement under the nine *Girsh* factors, issuing a 113-page opinion with 74 pages of lucid factual findings and a thorough analysis of each aspect of the settlement and of the appellant's objections. We find the District Court's opinion to be persuasive and its factual findings to be fully supported by the record. They are certainly not clearly erroneous. The Court's work product easily meets the standard of *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir. 1995): "In order for the determination that the settlement is fair, reasonable, and adequate to survive appellate review, the district court must show it has explored comprehensively all relevant factors." *Id.* at 805 (internal quotations omitted).

We note specifically that the plaintiffs faced a not insignificant risk of losing a summary judgment motion if this case was not settled; of the possible exclusion of their damages experts following a *Daubert*[13] hearing; and of an adverse verdict if the case reached trial.[14] We also note that the settlement followed over two years of extensive discovery, including more than eighty depositions,

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[13] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993).

[14] The objectors concede that there is no direct evidence of a price-fixing conspiracy, and that, therefore, they must present evidence both of conscious parallelism and of "plus factors" to make out a price-fixing case. They present only "three evidentiary artifacts" to meet the plus-factor requirement; all three are weak at best.

substantial document review, and the production of expert reports. We agree with the District Court that the stage of proceedings indicates that both sides were adequately informed of the strengths and weaknesses of the case, and strongly favors approval of the settlement. *See Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1314 (3d Cir. 1993) ("[P]ost-discovery settlements are more likely to reflect the true value of the claim and be fair."). Given the risks of establishing liability and damages, the complexity of the case, the stage of the proceedings, and the lack of substantial opposition to the settlement, we find no abuse of discretion in the District Court's approval of the settlement.

We likewise find no abuse of discretion in the District Court's denial of the objectors' motion for certification of a subclass. This issue arises from the objectors' claim that producer plaintiffs suffered distinct and greater damages than those endured by so-called investor plaintiffs. The District Court found that this purported distinction was unsupported by the facts of the case, was not relevant to the class claims (which were brought on behalf of "sellers," not producers or investors), and was raised at an extremely late point in the litigation. We agree.

V. *Disqualification of Class Counsel*

The objectors contend that Class Counsel should be disqualified because they are now representing a party (i.e., the plaintiffs) adverse to one they previously represented (i.e., the objectors), creating an impermissible conflict of interest. This contention raises an interesting threshold question as to the standard a district court should apply to the conflict determination.

The most extensive discussion of the conflict-of-interest issue within our jurisprudence is found in *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157 (3d Cir. 1984). In *Corn Derivatives*, we granted a motion to disqualify an attorney who had formerly represented several class representatives; some of the class representatives approved of a proposed settlement and others did not. Unlike the present case, in *Corn Derivatives* counsel had withdrawn

from representing the parties approving of the settlement and sought only to represent one objector on appeal. After consulting the relevant portions of the ABA's Model Rules of Professional Conduct and Model Code of Professional Responsibility,[15] we concluded that the prejudice to the former clients would be too great to justify counsel's continued representation of the objector. *See id.* at 162. We focused on the policies underlying the rules against an attorney representing a party in a matter in which a former client is now an adversary, including preventing "even the potential that a former client's confidences and secrets may be used against him"; maintaining "public confidence in the integrity of the bar"; and upholding the duty of loyalty that a client has the right to expect. *Id.*

Our opinion also discussed countervailing considerations, such as whether the counsel at issue represented the entire class (which was not the case in *Corn Derivatives*, but is true here), and the interest of the party who wishes to retain the counsel in avoiding increased costs and keeping "counsel who has extensive familiarity with the factual and legal issues involved." *Id.* Overall, however, we analyzed the situation no differently than we would have a non-class action case in which "two clients retained the same law firm to file suit, and where, later, that law firm chose to represent one of those clients against the other in the course of the same litigation." *Id.* at 161.

In his concurring opinion, Judge Adams more explicitly endorsed a balancing approach to attorney-disqualification motions in the class action context. Judge Adams argued that the rules for attorney disqualification could not be "mechanically transpose[d]" to the class action context and that the more appropriate means of

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[15] Currently, the ABA's Model Rules of Professional Conduct provide that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." Model Rules of Professional Conduct Rule 1.9(a)(1983); *see also id.* cmt. ("The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.").

addressing such issues was through "a balancing process." *Id.* at 163 (Adams, J., concurring). After discussing the rationale behind these points, he noted that, "[I]f a class attorney is automatically prevented from continuing to represent the named parties or a majority of a class which supports a settlement, the minority dissenting class members might obtain considerable leverage in the litigation by being able to force the majority to seek new counsel." *Id.* at 164 (Adams, J., concurring).

We agree with Judge Adam's concerns. In many class actions, one or more class representatives will object to a settlement and become adverse parties to the remaining class representatives (and the rest of the class). If, by applying the usual rules on attorney-client relations, class counsel could easily be disqualified in these cases, not only would the objectors enjoy great "leverage," but many fair and reasonable settlements would be undermined by the need to find substitute counsel after months or even years of fruitful settlement negotiations. "Moreover, the conflict rules do not appear to be drafted with class action procedures in mind and may be at odds with the policies underlying the class action rules." Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 Fordham L. Rev. 71, 127 (1996).

As the Second Circuit noted, in a case factually similar to *Corn Derivatives*:

> Automatic application of the traditional principles governing disqualification of attorneys on grounds of conflict of interest would seemingly dictate that whenever a rift arises in the class, with one branch favoring a settlement or a course of action that another branch resists, the attorney who has represented the class should withdraw entirely and take no position. Were he to take a position, either favoring or opposing the proposed course of action, he would be opposing the interests of some of his former clients in the very matter in which he has represented them.

> ....[W]hen an action has continued over the course of many years, the prospect of having those most familiar with its course and status be automatically disqualified whenever class members have conflicting interests would substantially diminish the efficacy of class actions as a method of dispute resolution.

In re "Agent Orange" Prod. Liab. Litig., 800 F.2d 14, 18-19 (2d Cir. 1986) (citations omitted). The court then concluded "that the traditional rules that have been developed in the course of attorney's representation of the interests of clients outside of the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation." *Id.* at 19. Rather, it held, a balancing approach like that advocated by Judge Adams in *Corn Derivatives* was more appropriate in the class action context.

The *Agent Orange* court listed a number of relevant factors in this balancing inquiry, including some from Judge Adams's opinion: the information in the attorney's possession, the availability of the information elsewhere, the importance of this information to the disputed issues, actual prejudice that could flow from the attorney's possession of the information, the costs to class members of obtaining new counsel and the ease with which they might do so, the complexity of the litigation, and the time needed for new counsel to familiarize himself with the case. *See Agent Orange*, 800 F.2d at 19.

We are persuaded by the well-reasoned opinions in *Agent Orange* and *Corn Derivatives*. We therefore hold that, in the class action context, once some class representatives object to a settlement negotiated on their behalf, class counsel may continue to represent the remaining class representatives and the class, as long as the interest of the class in continued representation by experienced counsel is not outweighed by the actual prejudice to the objectors of being opposed by their former counsel. In making this determination, the district court may consider the factors discussed in *Agent Orange* and in both the majority and concurring opinions in *Corn Derivatives*.

Turning to the present case, we note that the situation here differs from that in *Corn Derivatives* in that counsel there sought to represent only one party, an objector, and not the remaining class members. In a case such as the present one, the balance weighs heavily in favor of denying a motion for disqualification of class counsel that is made on the basis of nothing more than the fact that the objectors include former clients (in the same case) of class counsel, without any showing of impropriety or prejudice. *See also Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 161 (7th Cir. 1988) ("Recognizing that strict application of rules on attorney conduct that were designed with simpler litigation in mind might make the class-action device unworkable in many cases, the courts insist that a serious conflict be shown before they will take remedial or disciplinary action."); *cf. Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972) (noting that plaintiff's counsel in a derivative action "remains bound..., if the client has objected [to a settlement], to inform the court of this when presenting the settlement, so that it may devise procedures whereby the plaintiff, with a new attorney, may himself conduct further inquiry if so advised").

Objectors contend that Class Counsel in this case did not adequately represent all of the class members because they failed to consider the unique interests and damages of the producer plaintiffs.[16] Given our agreement with the District Court that the objectors' distinction between producer and investor plaintiffs is not supported by the record in this case, we find no clear error in the District Court's finding that Class Counsel adequately represented the interests of all class members, even if some class members and some of the class representatives are unsatisfied with the results of Class Counsel's efforts. *See Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d

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[16] We also note that the objectors' brief discusses not the ethical problems involved in the events that transpired, but the alleged shortcomings of Class Counsel while they represented the objectors. *See* Appellants' Br. At 38-41. Their claims sound less like an ethical breach requiring disqualification than like a hint of possible malpractice. *See also id.* at 42-45 (blaming Class Counsel for objectors' failure to raise their damages theory until late in the litigation and labeling this "an actionable breach of the professional standard of care under extant Pennsylvania law").

956, 964 (3d Cir. 1983) ("Class counsel's duty to the class as a whole frequently diverges from the opinion of either the named plaintiff or other objectors.").[17]

Applying the standard we have outlined above, we are satisfied that the District Court weighed the competing interests appropriately and did not abuse its discretion in denying the motion for disqualification of Class Counsel.

VI. *Conclusion*

For the foregoing reasons, the District Court's order approving of the settlement in this class action and denying objectors' motions for subclass certification and disqualification of Class Counsel will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[17] *See also Laskey v. International Union, UAW*, 638 F.2d 954, 957 (6th Cir. 1981) ("That the class counsel proposed a settlement which the named representatives opposed does not prove that the interests of the class were not protected."); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 508 (5th Cir. Jan. 1981) ("Because the 'client' in a class action consists of numerous unnamed class members as well as the class representatives, and because '[t]he class itself often speaks in several voices..., it may be impossible for the class attorney to do more than act in what he believes to be the best interests of the class as a whole...'" (citation omitted) (alteration and omissions in original)); *Maywalt v. Parker & Parsley Petroleum Co.*, 155 F.R.D. 494, 497 (S.D.N.Y. 1994) ("In the absence of concretely alleged acts of impropriety by the duly certified Class Counsel, or a showing abridgment of a significant minority of the Class' rights, this Court will not grant the hasty application of the Moving Representative Plaintiffs to replace Class Counsel on the eve of the Settlement Hearing."), *aff'd*, 67 F.3d 1072, 1079 (2d Cir. 1995).

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-3067

Lazy Oil Co.; John B. Andreassi; Thomas A. Miller Oil Company, on behalf of themselves and all others similarly situated; Carl B. Brown, Proprietor; Carl B. Brown Oil; Waco Oil and Gas Company; Gassearch Corporation; Interstate Drilling, Inc.; Alamco, Inc.; R. H. Adkins Companies; Wynnewood Drilling Associates

v.

Witco Corporation; Quaker State Corporation; Quaker State Oil Refining Corp.; Pennzoil Company; Pennzoil Products Company,

Lazy Oil Co.; John B. Andreassi; Thomas A. Miller Oil Co., Appellants

(D.C. Civ. No. 94-cv-00110E)-------

Present: BECKER, Chief Judge, STAPLETON, MANSMANN, GREENBERG, SCIRICA, ALITO ROTH, LEWIS, McKEEN, RENDELL, Circuit Judges, And HARRIS,* District Judge.

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

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*As to panel rehearing only.

service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

/S/
Chief Judge

DATED: MAR 10, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No(s). 98-3067

LAZY OIL CO.; JOHN B. ANDREASSI; THOMAS A. MILLER OIL COMPANY, on behalf of themselves and all others similarly situated; CARL B. BROWN, Proprietor; CARL B. BROWN OIL; WACO OIL AND GAS COMPANY; GASSEARCH CORPORATION;
INTERSTATE DRILLING, INC.; ALAMCO, INC.; R. H. ADKINS COMPANIES; WYNNEWOOD DRILLING ASSOCIATES

v.

WITCO CORPORATION; QUAKER STATE CORPORATION; QUAKER STATE OIL REFINING CORP.; PENNZOIL COMPANY; PENNZOIL PRODUCTS COMPANY

LAZY OIL CO.; JOHN B. ANDREASSI;
THOMAS A. MILLER OIL CO.,
Appellants

On appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 94-cv-00110E)

Present: Becker, Chief Judge, Stapleton, Circuit Judges, and Harris, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel December 11, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 31, 1997, be, and the same is hereby affirmed. Costs taxed against the appellants. All of the above in accordance with the opinion o f this Court.

ATTEST:

/S/
Clerk

Dated: February 2, 1999

Costs added hereto in favor of Appellee, Witco Corp. as follows:

Appendix	$7865.20
Supplemental Appendix	$ 211.00
Costs	$8076.20

Certified as a true copy and issued in lieu
Of a formal mandate on March 18,1999.

TESTE: /S/
Clerk, U. S. Court of Appeals
For the Third Circuit.

(Excerpts of District Court's Findings
of Fact and Conclusions of Law)

G. THE MOTION FOR CERTIFICATION OF A SUBCLASS

310. Finally, the Lazy Oil Objectors have moved this Court for certification of a subclass comprised of all class members engaged in the business of oil and gas production. (Lazy Oil Objectors' Mot. For Certification of Independent Producer Subclass [Doc. No. 184]. The stated purpose of this proposed subclass is "to fairly distinguish between those members of the class who, in their capacity as mere investors in particular oil wells, have claims arising solely from any differential in price, and those members of the class who are or were actively engaged in the business of the production of oil." (Mem. In Supp. Of Certification of Subclass [Doc. No. 186] at 1.) This distinction is necessary, it is claimed, in order to assure the fair treatment of class members' claims, since members who are mere investors (as opposed to producers) cannot as a matter of law press any claim for lost profits.

311. We have previously addressed the Lazy Oil Objectors' criticisms of the Pennzoil/Witco Settlement, particularly their objection that the Settlement is insufficient without adjusting the theory of damage to include compensation for class members' lost profits, and have found those criticisms unconvincing. Specifically, we have found that the lost profits theory of damages is less preferable in the context of this case than a price differential approach to damages because the former would yield a less reliable result and would require individualized inquiries ill-suited for class-wide resolution. As previously discussed, in attempting to apply a lost profits damages model, the Court would be required to examine each subclass member's financial history, costs of drilling, costs of production, opportunity for additional production and transportation expenses. Thus, the Court has serious reservations as to whether the movants could satisfy the requisite element of typicality.

312. Further, we have specifically credited Dr. Neels's testimony that the price differential theory of damages is a "substantially complete" damages theory which captures the "vast bulk" of the damages in this case. (Tr. Vol. 11 at 229)

313. We also seriously question whether the proponents of the subclass could satisfy the element of adequacy of representation. Specifically, we find convincing the argument that, because the market for Penn Grade crude is limited and members of the proposed subclass are competitors of one another, one member's ability to prove lost profits and or business could very well come at the expense of another member's ability to do the same. In this regard, we note Dr. Neels's suggestion that, if one member of the proposed subclass drilled additional wells closer to the Defendants' refineries, the Defendants would presumably substitute that closer (and therefore cheaper) oil for another producer's more distant (and therefore more expensive) oil. (See Aff. Of Dr. Kevin Neels.) Thus, there is at least a potential that each member of the proposed subclass would be put in a position of direct conflict with the other members of the subclass.

314. Finally, we agree with Plaintiffs that the Lazy Oil Objectors have not adequately defined their proposed subclass for purposes of certification. The asserted basis for the subclass distinction between producers and investors is that investors may not bring a claims for lost profits. Depending on the definition, however, certain "investors" may arguably be able to assert lost profits and/or lost business claims. We also add that the movants have not identified under which prong(s) of Rule 23(b) they seek certification.

315. For all these reasons, the Court finds that the Lazy Oil Objectors have not met their burden of demonstrating that certification of a subclass is appropriate. Because we find the motion for certification of a subclass to be unfounded, that motion will be denied.